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No. 93-518

In the  
Supreme Court of the United States  
October Term, 1993

FLORENCE DOLAN,

*Petitioner,*

v.

CITY OF TIGARD, OREGON,

*Respondent.*

On Petition for Writ of Certiorari  
to the Oregon Supreme Court

BRIEF OF *AMICI CURIAE*  
JON A. CHANDLER  
IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Does the City of Tigard's conditioning its approval of a land use permit upon the Dolans' surrender of property rights constitute an unconstitutional condition?

## TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED . . . . .	(i)
TABLE OF AUTHORITIES . . . . .	(iii)
INTERESTS OF <i>AMICI CURIAE</i> . . . . .	1
SUMMARY OF THE ARGUMENT . . . . .	2
THE TEST SET FORTH IN <i>NOLLAN</i> REQUIRES A HIGHER LEVEL OF JUDICIAL SCRUTINY THAN THE "REASONABLE RELATIONSHIP" TEST . . . . .	4
THE <i>NOLLAN</i> TEST REQUIRES THAT A CONNECTION BE PRESENT BETWEEN PUBLIC BENEFIT AND PRIVATE HARM . . . . .	8
CONCLUSION . . . . .	11

# TABLE OF AUTHORITIES

## PAGE

### Cases

<i>Agin v. City of Tiburon</i> , 447 U.S. 255 (1980) . . . . .	4
<i>Dolan v. City of Tigard</i> , 317 Or. 110, 854 P.2d 437 (1993) . . . . .	3, 4, 10
<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> , 480 U.S. 470 (1980) . . . . .	4
<i>MacDonald, Sommer &amp; Frates v. Yolo County</i> , 477 U.S. 340 (1986) . . . . .	4
<i>Nollan v. California Coastal Com'n</i> , 483 U.S. 825 (1987) . . . . .	2-9
<i>Schad v. Borough of Mount Ephraim</i> , 452 U.S. 61 (1981) . . . . .	4

### Treatises

Best, <i>New Constitutional Standards for Land Use Regulation</i> (Pacific Legal Foundation Conference Paper, July 22, 1987) . . . . .	2
Freilich & Garvin, <i>Takings After Lucas: Growth Management, Planning and Regulatory Implementation Will Work Better Than Before</i> , After Lucas: Land Use Regulation and the Taking of Property Without Compensation 53- 81 (1993) (emphasis added) . . . . .	6
Washburn, <i>Land Use Control, the Individual, and Society</i> , 52 Maryland L. Rev. 162, 174 (1993) . . . .	6

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INTERESTS OF AMICI CURIAE

Common Ground: The Urban Land Council of Oregon is a council of the Home Builders Association of Metropolitan Portland ("HBAMP"), with a membership comprised of commercial, industrial, and residential builders and developers.

HBAMP is an affiliate of the National Association of Home Builders, also an *amicus* in this case. HBAMP represents over 1,450 member firms in the Portland area, all of whom are involved in the residential housing industry in some capacity.

The written consent of the parties in this case has been obtained, and the letters of consent have been filed along with this brief.



The interest of these *amici* in this matter is profound. Not only does the case involve a city with whom many of the members of these *amici* do business, but it raises the broad question of the limits of local government's authority to exact land and improvements from those involved in the development of real estate. The membership of these *amici* are truly on the front lines of the battle between government power and individual freedom—for them, the issue is not one of esoteric political science but one that affects their ability to pursue their chosen occupations. Exactions of the sort required by the City of Tigard are not by any means uncommon, and yet very little guidance exists for developers and builders who wish to contest an onerous development condition. Too often, the decision whether or not to acquiesce to a governmental demand is based on bottom-line economics, not on the appropriateness of the exaction.

This Court's decision will, it is hoped, give these *amici* and others similarly situated some much needed protection against governmental overreaching in the land development approval process.

### SUMMARY OF THE ARGUMENT

When this Court decided *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987), and reaffirmed the principle that government regulation that did not "substantially advance" a legitimate governmental purpose would be an unconstitutional taking, real estate and land use commentators and pundits welcomed the decision with reactions ranging from delight to panic, depending on their ideological viewpoints. Regardless of the perspective of the commentator, though, a common thread of the analyses was that *Nollan* represented a significant change in the way constitutional takings claims were going to be viewed.<sup>1</sup>

The post-*Nollan* case law, though, has not necessarily reflected the changes announced in that decision. In the case at hand, for

example, the Oregon Supreme Court majority stated that in their opinion, *Nollan* did not actually change the analysis set forth in other decisions of this Court. *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993), Pet. App. A - 13-14.

This case presents the issue clearly: What standard does a development exaction have to meet to pass constitutional muster? The Oregon Supreme Court held that the "essential nexus" of *Nollan* is nothing more than a rephrasing of the "reasonable relationship" standard. Petitioners and these *amici* would argue that *Nollan* stands for the proposition that a higher level of scrutiny is required before governmental exactions will be upheld and that a greater connection between the exaction and the governmental cause supposedly being advanced must be demonstrated in order for the exaction to be constitutional.

At the heart of the *Nollan* nexus analysis is the concept of connectivity. It is not enough for government to demonstrate a temporal relationship between the development activity and the exaction being required; *Nollan* requires that the burden placed by means of a development exaction upon an individual property owner in pursuit of a greater public good must be directly connected to the impact created by that development. By way of illustration, an individual seeking a permit to build a deck in the backyard of their corner lot could not properly be required to install a stop light at the adjoining intersection, because there would be no connection between the permitted activity and the exaction being imposed. In the case at hand, there is not a great deal more connectivity than in this hypothetical, and the governmental exaction is similarly improper.

Also at issue in this case are the findings that must be made by government before imposing an exaction. Even if an essential nexus could be demonstrated in this case, the City of Tigard failed to articulate it. Moreover, the Oregon Supreme Court, by accepting the city's inadequate findings, failed to uphold its obligation to require government to prove its case by sufficient evidence prior to imposing a private burden for an ostensible public good. If the relaxed level of judicial review employed by the Oregon court is acceptable, then future takings cases will not need to be decided by justices on constitutional principles but by

<sup>1</sup> See, e.g., Best, *New Constitutional Standards for Land Use Regulation* (Pacific Legal Foundation Conference Paper, July 22, 1987); *President's Message*, *Oregon Planner's Journal* (July-August 1987).

clerks ticking off boxes on a form every time the appropriate phraseology is used.

1. THE TEST SET FORTH IN *NOLLAN* REQUIRES  
A HIGHER LEVEL OF JUDICIAL SCRUTINY  
THAN THE "REASONABLE RELATIONSHIP" TEST

This Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), set forth the principle that a constitutionally impermissible taking occurs if government regulation either denies a property owner economically viable use of his or her property or if a regulation fails to substantially advance a legitimate governmental interest. *Id.* at 260. This formulation was repeated by this Court in numerous cases prior to the Court's revisit of regulatory takings in *Nollan*. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1980); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

The *Nollan* decision expanded and elaborated on the *Agins* holding by stating that "substantial advancement" of a governmental interest can be found only where there is an "essential nexus," *Nollan*, 483 U.S. at 837, between the governmental interest and the demand made upon the property owner. This required essential nexus is determined by examining the connection between the governmentally imposed condition and the burden placed upon the general public by the permit applicant. If the impact of the governmental condition is out of proportion to the burden imposed by the applicant's proposed project, then the essential nexus is not present and the permit condition is unconstitutional.

Notwithstanding the clear progression in this Court's takings doctrines, the Oregon court held that *Nollan* effected no change in the legal test to be applied to regulatory takings cases. *Dolan*, Pet. App. A-13. The plain language of *Nollan*, however, makes it clear that this Court intended judicial scrutiny of takings cases to be of a higher level than had been used previously. The interpretation made by the Oregon court would render *Nollan* not only legally insignificant but factually ludicrous: The statement in

*Nollan* that "our cases describe the condition for abridgment of property rights through the police power as a 'substantial advanc[ing]' of a legitimate state interest" makes no sense if the end result is the "reasonable relationship" test. *Nollan*, 483 U.S. 841 (emphasis in original).

In reaching its conclusion that *Nollan* did not really mean what it said, the Oregon court first quotes *Nollan* for the proposition that the

"constitutional propriety of an exaction disappears if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury."

The Oregon court then concludes:

The quoted passage indicates that, for an exaction to be considered "reasonably related" to an impact, it is essential to show a nexus between the two, in order for the regulation to substantially advance a legitimate state interest . . . .

This convoluted exegesis by the Oregon court stands the language of *Nollan* on its head. The phrase "reasonably related" was certainly in common parlance when *Nollan* was decided; it is eminently reasonable to assume as a matter of legal interpretation that had this Court intended to use "reasonably related" as the operative test, it could and would have done so. It is further reasonable to assume, as have most courts with the notable exception of California and now Oregon, that when this Court used the words "essential nexus" where some grammatical variation of the phrase "reasonably related" could have been

expected to appear, the Court intended to convey a different meaning.

It is of course true that the precise meaning of "essential nexus" has yet to be established, but the Oregon court's exercise in looking glass logic ignores the fact that the phrase does have some intrinsic meaning and was not intended to be a flowery restatement of the old test. As one commentator put it:

*Nollan* stopped short of creating a per se rule for title takes. Thus, in the balancing test, which weighs the importance of the governmental objectives against the economic harm or deprivation of investment-backed expectations, the court will simply apply a higher scrutiny to the governmental objectives. There is, therefore, no per se rule but a heightened scrutiny within the ad hoc factual inquiry balancing test . . . .

Freilich & Garvin, *Takings After Lucas: Growth Management, Planning and Regulatory Implementation Will Work Better Than Before*, AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 53-81 (1993) (emphasis added); see also Washburn, *Land Use Control, the Individual, and Society*, 52 Maryland L. Rev. 162, 174 (1993) (proper test for constitutionality post-*Nollan* is not rational relationship).

Furthermore, the Oregon court's decision contains a telling factual error, even granting that court the benefit of its own interpretation of the proper constitutional analysis. The court below says

In *Nollan*, the Court stated that, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, then, tells us that an exaction is reasonably related to an impact if the

exaction serves the same purpose that a denial of the permit would serve . . . .

In this case, we conclude that city's unchallenged factual findings support the dedication conditions imposed by city.

*Dolan*, 317 Or. at 120-21 (citation omitted). Assuming for purposes of argument that the Oregon court's interpretation of *Nollan* is correct, the conclusion reached by that court does not flow from the facts of the case. If, as the Oregon court would put it, a reasonable relationship occurs if the "exaction serves the same purpose that a denial of the permit would," how is a reasonable relationship therefore present in this case? This case involves the exaction of land for a bicycle path and a storm water greenway; if the land use application in question were to have been denied, would either the bike path or the greenway have been built? The petitioners were in lawful possession of the land and were conducting a lawful business on the property. Had they, when presented with the city's exaction demands, simply chosen not to construct the proposed expansion of their business, the city would have had no legal means to compel them to donate either the land or the construction of the improvements on it.

A denial of the requested permit, in this instance, would *not* serve the same purpose as the exaction. This is not a case where the underlying governmental purpose is the avoidance of a public harm, but rather the affirmative accomplishment of a purported public good--denying the permit would accomplish nothing for the city or the public.

Given that what the city wanted to obtain by means of exaction was a bike path and greenway, and given that what they would obtain by denial of the permit was no bike path and no greenway, there was no "reasonable relationship" even by the Oregon court's own interpretation of the law. The court below not only misread *Nollan* but failed to follow its own syllogism and in the process aided and abetted Tigard's "'out-and-out plan of extortion.'"



*Nollan*, 483 U.S. at 837 (citation omitted). This point was central to the dissent of Justice Peterson in the Oregon court.<sup>2</sup>

## II. THE *NOLLAN* TEST REQUIRES THAT A CONNECTION BE PRESENT BETWEEN PUBLIC BENEFIT AND PRIVATE HARM

The facts of this case involve an existing business that wished to expand its operations by tearing down the existing store and constructing a larger new one on the same 1.67 acre site. To accomplish these objectives, the owners of the business had to have their plans reviewed by the city and needed to obtain a building permit. Pet. App. J-3. Although no change of use was contemplated, no additional land was to be acquired, and no rezoning or comprehensive plan change was required, the city used the development approval process to require as a condition of development that the petitioners dedicate some 7,000 square feet of their property to the city for a greenway and a bicycle path adjacent to the greenway.

Before the city can constitutionally impose these requirements on the property owner, there must be a connection between the governmental exaction and the public burden imposed by the

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<sup>2</sup> The dissent concluded as follows:

From reading the order in this case, I am convinced that Tigard decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. This is what happened in this case.

The findings here do not establish any cognizable remediable purpose attributable to the change in use. The conditions relating to the pedestrian/bicycle pathway and flood control and greenway easements are impermissible on the record made in this case.

property owner. This is the crux of *Nollan's* "essential nexus" requirement:

We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction . . . .

*Nollan*, 483 U.S. at 841 (emphasis in original).

The "substantial advancement" of a state interest in the case at bar would require that Tigard's exaction demands of the property owners be directly and proportional to the request being made by those owners of the city. This did not occur. There is not an "essential nexus" between the exactions and the permit application; the conditions demanded consequently do not "substantially advance" any governmental interest.

A review of the record at the local level illustrates this contention. In its final order, the city made findings as follows:

"[T]he [City of Tigard Planning] Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of



the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

....

"[T]he Commission finds that the required dedication [of the greenway] would be reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek . . . . The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes."

*Dolan*, 317 Or. at 113-14 (emphasis added).

These findings were cited approvingly by the *Dolan* majority, yet there is nothing in these findings that approaches the Oregon court's "reasonable relationship," much less the "essential nexus" required by this Court. Instead, these findings consist of suppositions and conjecture.

The city says that it is "reasonable to assume" that customers and employees of the future uses of the site could use the bike path for their business and recreational needs and states that the path "could" result in more pedestrians and bicyclists and fewer

automobiles. It is important to keep in mind that the land use in question is a plumbing and electrical store--does the city really believe that patrons of the store will ride their bicycles and carry bathtubs home on their heads? In any event, an assumption, reasonable or not, cannot provide a proper basis for taking property away from a citizen; the recreational needs of patrons cannot form a valid basis on which to judge a commercial development application; an unknown number of pedestrians and bicyclists cannot be used to justify this exaction. And finally, blatant bootstrapping should have no place in constitutional inquiries of this nature--the bicycle parking used to justify the imposition of the bike path condition was itself *required by the city as a condition of development*. This is akin to cutting off a man's leg and then firing him for limping.

Similarly, the local record quoted above justifies the exaction for the greenway with expectations and anticipations, but in neither instance does the city provide any hard factual evidence that the development being proposed creates a need for the bicycle path or the greenway. The test set forth by this Court--that development exactions must "substantially advance" a legitimate governmental interest and that an "essential nexus" must be demonstrated--must not be fulfilled by a record that contains nothing more than suppositions and surmises. Rather, should these exactions be allowed to stand on the facts presented in this case, the proper constitutional fit for regulatory takings would be neither "reasonable relationship" nor "essential nexus," but "close enough."

## CONCLUSION

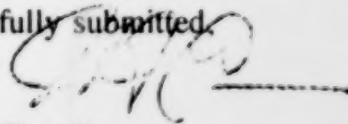
It is significant that no one in this case, whether a party or an *amicus*, is quibbling over the starting assumption that the greenway and the bike path are legitimate governmental interests. Those of us who live and do business in Oregon are proud of our environment and our quality of life. Your *amici* have supported local and statewide planning efforts that enhance environmental protection and the reduction of automobile travel. The issue, though, for us, and all engaged in the land development industry,

is not whether governmental purposes are laudable, but whether we are being asked to bear a disproportionate share of the burden in accomplishing them. In the instant case, the city could have either proved and quantified its assertions--that the development would increase storm water runoff into the stream or that completion of the bicycle path would result in a definite number of autos being off the highways--or it could have purchased the property in question, either through condemnation or through voluntary means such as a local improvement district.

What the city cannot be allowed to do, though, is place the entire burden of providing a public benefit on a property owner without demonstrating the necessary connections. Such actions, particularly when they are supported not by findings but by guessings, threaten not only the rights of property owners but also all who make a living improving or selling real estate. The U.S. Constitution and this Court can provide some protection against governmental overreaching, but only if actions such as those engaged in by the City of Tigard and endorsed by the Oregon court are emphatically disapproved.

We therefore respectfully request that this Court reverse the decision of the Oregon Supreme Court.

Respectfully submitted,



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